ATTORNEY FOR APPELLANT:

MICHAEL R. FISHER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM DIXSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0601-CR-44
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0505-FB-82678

January 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial resulting in convictions for dealing cocaine, a Class B felony, and possession of cocaine, a Class D felony, William Dixson appeals his conviction for dealing cocaine and seeks review of his sentence of eighteen years executed. Dixson raises two issues, which we restate as: (1) whether the trial court properly denied Dixson's motion to dismiss based on the State's dismissal of the original charges and subsequent refiling of more serious charges; and (2) whether Dixson's sentence is appropriate. We conclude that the trial court properly denied Dixson's motion to dismiss and that Dixson's sentence is appropriate given his character and the nature of the offense.

Facts and Procedural History

On May 5, 2004, police officers found Dixson sleeping in a car with 0.9540 grams of crack cocaine in his hand. On May 6, 2004, the State charged Dixson with possession of cocaine, a Class D felony. On May 30, 2004, Dixson was arrested in connection with another charge and brought to the police station for questioning. During interrogation, Dixson admitted to having been a drug dealer and made several statements indicating that he might have been selling drugs at the time of his arrest on May 5, 2004. On May 9, 2005, over a year after the original filing, the State informed Dixson that "additional charges will be necessary if proceeding to trial." Appellant's Appendix at 46. No plea agreement was reached, and on May 26, 2005, the State moved to dismiss the possession charge and filed another information charging Dixson with dealing cocaine, a Class B felony, possession of cocaine, a Class D felony, and with being an habitual substance offender. Dixson moved to

dismiss the charges, and the trial court dismissed the habitual substance offender charge, but denied Dixson's motion with respect to the dealing and possession charges. After waiving his right to a jury trial, Dixson was found guilty of dealing cocaine and of possession of cocaine. The court found that the charges merged and sentenced Dixson to eighteen years for the dealing charge.[1] Dixson now appeals.

Discussion and Decision

I. Dixson's Motion to Dismiss

A. Standard of Review

Dixson appeals from a negative judgment as he bore the burden of proving all facts necessary to his motion to dismiss at trial. Hollowell v. State, 773 N.E.2d 326, 330 (Ind. Ct. App. 2002). We will reverse a negative judgment only if the evidence is without conflict and leads inescapably to the conclusion that the defendant is entitled to a dismissal. Id.

B. Denial of Dixson's Motion to Dismiss

Dixson argues that the trial court should have granted his motion to dismiss because the filing of more serious charges was motivated by prosecutorial vindictiveness and was an attempt to circumvent a potentially adverse ruling in the original trial court. We conclude

---

[1] It is not clear from the record whether a conviction was actually entered on the possession of cocaine charge. The chronological case summary identifies the disposition of the possession charge as "proven," Appellant's Appendix at 3, but also indicates that "[j]udgment of conviction [was] entered on count(s) 1 2." Id. at 10. At the sentencing hearing, Dixson's counsel asked the court, "The D felony, that merges . . . with the B; correct?" Transcript at 47. The trial court replied, "The D felony . . . we need to show that as proven. We need to put whatever code for the D felony will result in it's [sic] not kicking out on the abstract, but I do want to show it proven." Id. Possession of cocaine is a lesser-included offense of dealing cocaine. Hardister v. State, 849 N.E.2d 563, 576 (Ind. 2006). Therefore, it is not adequate to merely merge the offenses; the conviction for possession must be vacated. Payton v. State, 818 N.E.2d 493, 497 (Ind. Ct.

that the prosecutor did not act vindictively, and that Dixson's substantial rights were not affected when the State dismissed the original charges against Dixson and subsequently filed more serious charges.

1. Prosecutorial Vindictiveness

Prosecutorial vindictiveness is prohibited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Blackledge v. Perry, 417 U.S. 21, 27 (1974). In Indiana, defendants also have a due process right to be free from prosecutorial vindictiveness under Article 1, Section 12 of the Indiana Constitution. Owens v. State, 822 N.E.2d 1075, 1077 (Ind. Ct. App. 2005). To find a due process violation, we need not find that the prosecutor actually acted vindictively, but need find only that the prosecutor's actions raise the apprehension of vindictive motive. Blackledge, 417 U.S. at 28.

Dixson first argues that given the circumstances of this case, a presumption of prosecutorial misconduct should arise. To support this argument, Dixson cites Cherry v. State, 414 N.E.2d 301 (Ind. 1981), cert. dismissed, 453 U.S. 946 (1981), and Warner v. State, 773 N.E.2d 239 (Ind. 2002). We find Cherry and Warner distinguishable, and hold that no presumption of vindictiveness arises under the circumstances of this case.

In Cherry, the defendant was originally charged with three counts: (I) rape, (II) criminal deviate conduct, and (III) being an habitual offender. The State tried the defendant on counts II and III, resulting in a conviction for count II and a hung jury on count III. The State then dismissed counts I and III. The defendant filed a motion to correct errors based on

---

App. 2004), trans. denied. Therefore, we remand with instructions that the trial court, if it has not already

the admission of prejudicial testimony and the defendant's poor physical condition during trial. The defendant was granted a new trial on Count II, and the State refiled counts I, II, and III. The defendant was convicted of all three counts and received a lengthier sentence than he had at his original trial.

Our supreme court reversed the defendant's convictions on counts I and III. The court held that the defendant had been impermissibly punished for pursuing an appeal of his original conviction. Cherry, 414 N.E.2d at 306. The court held that the State bears the "heavy burden" of proving that it did not act vindictively by filing more serious charges for the same underlying conduct after the defendant has successfully appealed. Id. at 305. The court noted its concern that if defendants faced the threat of more serious charges after a successful appeal, they might be less likely to exercise this right to appeal. Id.

In Warner, the defendant was originally charged with murder. After the trial court granted the defendant's motion for a mistrial, the State amended its information to add charges of felony murder and attempted robbery. The defendant was then convicted of murder and attempted robbery.

Our supreme court reversed the conviction for attempted robbery. The court held that, excepting cases in which the State discovers new evidence, "the potential for prosecutorial vindictiveness is too great for courts to allow the State to bring additional charges against a defendant who successfully moves for a mistrial." Warner, 773 N.E.2d at 243. The court stated that the State offends "fundamental fairness" when it adds new charges in response to

---

done so, vacate Dixson's conviction for possession of cocaine.

a defendant exercising his right to a fair trial. Id. at 243-44.

Dixson argues that, like the defendants in Cherry and Warner, he was punished for exercising his right to a fair trial, and therefore, a presumption of prosecutorial misconduct should arise. However, unlike in Cherry and Warner, the State in this case filed additional charges before Dixson's trial. Although, in a sense, Dixson was punished for exercising his right to a fair trial, so is every defendant who rejects the State's plea offer. Our criminal justice system encourages plea bargaining and has "accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial." United States v. Goodwin, 457 U.S. 368, 378 (1982). In accordance with this recognition, our supreme court has held that "[w]here additional charges are filed prior to trial, there is no presumption of vindictiveness." Vaxter v. State, 508 N.E.2d 809, 812 (Ind. 1987). Accordingly, no presumption of vindictiveness arises in this case.

Because no presumption arises, Dixson bears the burden of demonstrating that the State's "decision to [refile] was motivated by a desire to punish [Dixson] for doing something the law allowed him to do." Reynolds v. State, 625 N.E.2d 1319, 1321-22 (Ind. Ct. App. 1993), trans. denied. Dixson has failed to meet this burden.

Dixson argues that prosecutorial vindictiveness is evidenced by the prosecutor's statement that if Dixson did not enter into a plea agreement, Dixson's "D felony will be upgraded to a B felony Dealing with an Habitual Substance Offender enhancement." Appellant's App. at 46. We do not find this statement to indicate vindictiveness, and instead

find it to be an example of a typical statement made in the course of plea negotiations. No vindictiveness is shown by the prosecutor's statement indicating the prosecutor's intention to charge Dixson with a more serious offense if Dixson refuses to accept the plea offer. See Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) ("To hold that the prosecutor's desire to induce a guilty plea . . . may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself.").

Dixson further argues that we should find the prosecutor to have acted vindictively because no new evidence supported the more serious charge of dealing. Dixson's statements indicating his intention to distribute cocaine were made after the original filing, but Dixson argues that this evidence should not be considered "new" because the State did not refile until over a year after Dixson made these incriminatory statements. We disagree. Although the State did not immediately amend its charge after acquiring the new evidence, this evidence provided the basis for the amended charges. See Warner, 773 N.E.2d at 243 ("It is central to the theory [of allowing the State to amend its charges in certain circumstances] that if new evidence is discovered, it contribute to the State's case against the defendant."). Dixson argues that this evidence was not used in the second probable cause affidavit, and that this should lead us to conclude that this new evidence was not the basis for the more serious charge. However, as the trial court found, without Dixson's incriminatory statements, the State probably did not have sufficient evidence with which to charge Dixson with dealing. Tr. at 64-65 ("[T]he dealing part is hard with one bag of rock cocaine . . . so the admission is significant."). Most importantly, the State introduced Dixson's statements at trial in support

of the dealing charge, evidencing its good faith belief that this evidence warranted the enhanced charge.

The prosecutor also put forth a good faith explanation for the delay in charging Dixson with dealing. The prosecutor explained that the delay in filing was due to a reassignment of this case, and that she alerted Dixson to her intent to charge him with a more serious offense shortly after discovering the evidence of Dixson's statement.

The State did not file the more serious charge to punish Dixson for exercising his right to a fair trial; the State filed the more serious charge because it had evidence, discovered after the original filing, that supported the charge, and proceeded to file after plea negotiations failed. See Goodwin, 457 U.S. at 480 ("[A] prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded."). We find no evidence of prosecutorial vindictiveness.

2. The Refiling's Effect on Dixson's Substantial Rights

Pursuant to Indiana Code section 35-34-1-5, the State may modify information after the omnibus date only when it does not affect a defendant's substantial rights. Dixson argues that by dismissing the original charge and refiling the more serious charges after the omnibus date,[2] the State circumvented the requirements of section 35-34-1-5 and prejudiced his substantial rights.

The State is statutorily authorized to dismiss charges any time prior to sentencing, and the granting of the State's motion to dismiss does not necessarily prevent the State from

trying the defendant for the same offense. Ind. Code § 35-34-1-13(a); Hollowell, 773 N.E.2d at 330. Indiana courts allow the State to file a second information as long as in doing so the State does not "abuse its power and prejudice a defendant's substantial rights." Davenport v. State, 689 N.E.2d 1226, 1230 (Ind. 1997), modified on reh'g, 696 N.E.2d 870 (Ind. 1998).

The State does not necessarily prejudice a defendant's substantial rights when the refiled information either amends the original information while still charging the same offenses or amends charges, even as to theory and identity. Hollowell, 773 N.E.2d at 330. When discussing situations that would not prejudice a defendant's rights, our supreme court has concluded that a "defendant's substantial rights are not prejudiced in these situations primarily because he can receive a fair trial on the same facts and employ the same defense in the second trial as in the first." Davenport, 689 N.E.2d at 1229. Whether a defendant's substantial rights have been prejudiced "is a fact-sensitive inquiry, not readily amenable to bright-line rules." Johnson v. State, 740 N.E.2d 118, 120 n.3 (Ind. 2001). We find four cases decided after Davenport to be similar to this case, and briefly discuss the relevant facts of each.

In State v. Klein, 702 N.E.2d 771 (Ind. Ct. App. 1998), trans. denied, the State originally charged the defendant with attempted rape, attempted criminal deviate conduct, criminal deviate conduct, and criminal confinement. Over a year later, after failed plea negotiations and three weeks before trial, the State moved to amend the charges to include a

---

[2]The record does not disclose the precise omnibus date, but the parties agree that the second filing

count of attempted murder. The trial court denied the State's motion as untimely. The State then moved to dismiss, and refiled, including the attempted murder charge. This court held that by circumventing the trial court's denial of its motion to amend, the State had abused its prosecutorial discretion. We refused to allow the State to proceed with the attempted murder charge, as the State had prejudiced the defendant's right to prepare a defense for the additional charge. Id. at 776.

In Malone v. State, 702 N.E.2d 1102 (Ind. Ct. App. 1998), trans. denied, the defendant was charged with several crimes, but charges of criminal recklessness and intimidation were severed from the others. The State moved to dismiss these two charges, and later refiled charges of attempted murder and intimidation. We held that the State's refiling of the more serious charges did not affect the defendant's substantial rights. We noted that the defendant still had adequate time to prepare his defense and was able to use "substantially the same theories of defense," and that the State had not received an adverse ruling before it moved to dismiss and refiled. Id. at 1104.

In Johnson, the defendant was originally charged with sexual misconduct. The trial court excluded evidence after the prosecutor missed a notice deadline. The State then moved to dismiss the charge, and refiled nine days later, including ten new charges in its information. Our supreme court held that the State had "exceeded the boundaries of fair play," and held that the trial court abused its discretion by failing to dismiss the additional ten counts. 740 N.E.2d at 121. The court noted several factors that led to its conclusion: "Here,

---

occurred after the omnibus date.

no new evidence was discovered between the dismissal and refiling. No elements of the additional charged crimes were completed during that interim. No honest mistake or oversight occurred in the original decision to prosecute." Id.

In Hollowell, the defendant was originally charged with battery and resisting law enforcement. The State moved to dismiss on the day of trial because the primary witness failed to appear. Based upon the same facts and probable cause affidavit, the State refiled, adding an additional count of resisting law enforcement and one count of escape, charges that the State claimed it had erroneously omitted from the original information. We found that the defendant's substantial rights were not affected[3] based on the following: the State had not dismissed in order to circumvent a trial court ruling; the refiling occurred roughly seven months before trial, giving the defendant adequate time to prepare his defense; the two additional counts were based on the same facts and probable cause affidavit; and the State had honestly, albeit erroneously, failed to include the additional counts in the original information. Hollowell, 773 N.E.2d at 331.

In this case, although we find several factors in favor of reversing the trial court's decision, we conclude that the factors supporting a conclusion that the refiling did not affect Dixson's substantial rights are more substantial.

Here, as in Johnson, no new evidence was discovered between the dismissal and the refiling and no new elements were completed during this time period. Instead, as in Klein,

[3] In Hollowell, the defendant argued that the prosecutor had acted vindictively. However, our decision addressed the issue of whether the prosecutor had abused its discretion and prejudiced the defendant's substantial rights.

the State had possessed the evidence necessary to charge Dixson with dealing for over a year when it dismissed and refiled. Moreover, Dixson had appeared, either in person or by counsel at least nine times in connection with this case before the State dismissed the charges. Although there is no evidence that the failure to charge Dixson with dealing much earlier was anything but an honest mistake based on oversight or a lack of communication, a defendant's rights may be violated in the absence of bad faith. E.g., Groh v. Ramirez, 540 U.S. 551, 558 (2004) (holding that the State cannot use "good faith exception" to warrant requirement when the warrant is "obviously deficient" on its face); Strickland v. Washington, 466 U.S. 668, 690 (1984) (holding that under performance prong for an ineffective assistance of counsel claim defendant must show that his counsel's act was not the result of "reasonable professional judgment"); Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). Moreover, that the individual prosecutor who eventually tried this case did not personally know of Dixson's statements made subsequent to the original filing when they were made is not particularly relevant when assessing whether Dixson's substantial rights were prejudiced. As an agent of the State, a prosecutor is often charged with the knowledge of other agents of the State. E.g., Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); Michigan v. Jackson, 475 U.S. 625, 634 (1986) ("Sixth Amendment principles require that we impute the

State's knowledge from one state actor to another."); Finney v. State, 786 N.E.2d 764, 767 (Ind. Ct. App. 2003) (citing Jackson, 475 U.S. 625). The timing of events that led to the refiling of the more serious charge weighs in favor of a conclusion that Dixson's substantial rights were affected.

Here, as in Malone and Hollowell, the trial court had not yet made an adverse ruling when the State moved to dismiss and refiled. We recognize the rationale of Dixson's argument that allowing the State to proceed as it did, in effect, allows the State to avoid section 35-34-1-5, and that in this case the trial court could very well have denied the State's motion to amend the charges. That is, if the State anticipates an adverse ruling on its motion to amend, it could dispense with moving to amend, and instead move to dismiss and then refile. However, our supreme court has held that in situations where the State dismisses and refiles, instead of amending, "I.C. § 35-34-1-5, which governs the amendment of an information is inapplicable." Willoughby v. State, 660 N.E.2d 570, 577 (Ind. 1996). In Willoughby, in which the State refiled more serious charges after a mistrial necessitated by a State's witness's unsolicited comment, our supreme court went on to state that it recognizes "the danger of prosecutorial abuse and will vigilantly seek out and correct such abuse in situations where the State intentionally causes a mistrial for the purposes of materially altering an information." Id. Similarly, while we make no holding on this point, we note that the outcome of our decision might differ if evidence indicated that the State knew that that trial court would have rejected a motion to amend the charges against Dixson. However, without such evidence, the lack of an adverse ruling weighs against a conclusion that

Dixson's substantial rights were affected.

Here, as in Hollowell, the State filed the same probable cause affidavit with the second information. However, although the dealing charge is based upon the same underlying event as the original possession charge, it is not based upon the same evidence. Dixson was arrested in possession of less than a gram of crack cocaine, and no circumstantial evidence surrounding the events of his arrest support a charge of dealing.[4] The prosecutor indicated that without Dixson's subsequent statement to police, made during the interrogation involving another offense, the State had no basis for charging Dixson with dealing. Therefore, the fact that the State refiled with an identical probable cause affidavit is not particularly relevant to the effect of the refiling on Dixson's rights. [5]

Dixson, like the defendants in Klein and Johnson, was forced to revise his defense strategy based on the new charge. The elements of dealing cocaine are not substantially the same as the elements of possession of cocaine.[6] Also, while Dixson faced a maximum sentence of three years for the possession charge, [7] Dixson faced a maximum penalty of

---

[4] The trial court admitted that "all of the factors [indicating that Dixson had no intent to deliver the cocaine] are great; except for the fact that they're contradicted by the defendant's statement which contains admissions that he was, in fact, a drug dealer. And because of that, the Court finds the State has proven beyond a reasonable doubt . . . the intent to deliver." Tr. at 24 (emphasis added).

[5] We express significant doubt as to whether this affidavit actually puts forth probable cause to charge Dixson with dealing, as the State indicates that the facts contained within this affidavit were not sufficient at the time of the first filing to charge Dixson with dealing.

[6] To be convicted of dealing cocaine, the State must prove that the defendant possessed cocaine with the intent to manufacture, finance the manufacture of, deliver, or finance the delivery of cocaine. Ind. Code § 35-48-4-1.

[7] Ind. Code § 35-50-2-5 (D felonies).

twenty years for the dealing charge.[8] However, the revisions Dixson was forced to make to his defense strategy are not as substantial as those made by the defendants in Kelin and Johnson, as the crimes of possession of cocaine and dealing cocaine are related, and Dixson admitted to being a drug dealer in a subsequent investigation. These circumstances weigh slightly in favor of a conclusion that Dixson's substantial rights were not affected.

Dixson, like the defendants in Malone and Hollowell, had adequate time to prepare his defense, as he was not tried until roughly six months after the charges were refiled.[9] Also, although the State did not indicate that it would use Dixson's statement given during an unrelated investigation to charge Dixson with dealing in this case until over a year after Dixson gave the statement, from the time Dixson gave the police his statement, he was aware of all the evidence eventually used against him. This knowledge reduces the danger of unfair surprise. That Dixson was given ample time to prepare for trial weighs in favor of a conclusion that his substantial rights were not affected.

After considering the facts of this case, we hold that Dixson's substantial rights were not prejudiced. We recognize that the process that led to Dixson's charges being upgraded from a D felony to a B felony over a year after the State had all its relevant evidence and after Dixson had appeared in court at least nine times is far from ideal. However, Dixson was given six months to prepare for trial and was aware of the evidence against him from the

---

[8] Ind. Code § 35-50-2-7 (B felonies).

[9] Dixson was tried in December 2005, roughly six months after the refiling and over a year and a half after the original filing.

time he gave his statement to the police. Dixson therefore suffered little unfair surprise, and, with respect to notice and time to prepare, received a fair trial. On the facts of this case, we hold that Dixson's substantial rights were not prejudiced by the State's refiling of more serious charges, and that the trial court did not abuse its discretion by denying Dixson's motion to dismiss the dealing charge.

II. Sentencing

After finding Dixson guilty of dealing cocaine, the trial court conducted a sentencing hearing and sentenced Dixson to eighteen years executed in the Department of Correction. The maximum penalty for a Class B felony is twenty years. Ind. Code § 35-50-2-7. Dixson argues that given his character and the nature of the offense, the sentence is inappropriate.

A. Standard of Review

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(b). Under this rule, we have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

B. Appropriateness of Dixson's Sentence

When reviewing a sentence to determine if it is appropriate, we look at the

presumptive or advisory[10] sentence as the starting point of our analysis. Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). The advisory sentence for a Class B felony is ten years. Ind. Code § 35-50-2-5. The trial court imposed a sentence of eighteen years, eight years above the advisory sentence and two years below the maximum allowed sentence. Id. Dixson's criminal history includes three true findings as a juvenile, a conviction for dealing in a look-a-like substance, and two convictions for possession of cocaine. We acknowledge that there is no evidence suggesting that the nature of Dixson's offense is any worse than the typical offense of dealing cocaine, as Dixson possessed a relatively small amount of cocaine.[11] We also disagree with the State's argument that Dixson's sentence is appropriate because "[Dixson's] admissions made it clear that he understood the nature of the offense, and understood that he had non-criminal alternatives, but still chose crime anyway." Appellee's Brief at 8. Dixson's understanding of the criminal nature of his actions, standing alone, does not end our analysis of the appropriateness of Dixson's sentence under Rule 7(b). However, given Dixson's criminal history, we conclude that the eighteen-year sentence is not inappropriate. See Smith v. State, 839 N.E.2d 780, 788 (Ind. Ct. App. 2005) (defendant's

---

[10] Our legislature responded to Blakely v. Washington, 542 U.S. 296 (2004), by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. We do not have to decide which sentencing scheme applies in this case because Dixson argues only that his sentence is inappropriate under Rule 7(B). We will use the term "advisory" throughout this opinion.

[11] A defendant must possess at least three grams of cocaine in order for the crimes of possession or dealing cocaine to be upgraded based solely on the amount of cocaine possessed or delivered. Ind. Code §§ 35-48-4-1(b)(1) (offense of dealing cocaine is an A felony if amount involved is three grams or more); 35-48-4-6(b)(1)(A) (offense of possession of cocaine is a C felony if defendant possesses three grams or more). Dixson, on the other hand possessed only 0.954 grams. Cf. Rivera v. State, 841 N.E.2d 1169, 1172 (Ind. Ct. App. 2006), vacated on other grounds, 851 N.E.2d 299 (Ind. 2006) (considering as part of the nature of the

criminal history of five felony convictions and numerous misdemeanor convictions standing alone supported the imposition of the maximum sentence).

Conclusion

We hold that the trial court did not abuse its discretion in denying Dixson's motion to dismiss. We further hold that Dixson's eighteen-year sentence is not inappropriate based on his character as evidenced by his criminal history. We therefore affirm Dixson's conviction for dealing cocaine and his eighteen-year sentence. We remand to the trial court with instructions to vacate any conviction that was entered for possession of cocaine.

Affirmed in part and remanded with instructions.

SULLIVAN, J., and BARNES, J., concur.

---

offense the fact that defendant sold undercover police officer 970.8 grams of methamphetamine, while delivery of three or more grams elevates offense to an A felony).